

STATE OF NEW YORK  
COURT OF APPEALS

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In the Matter of SAVE THE PINE BUSH, INC.;  
LYNNE JACKSON; REZSIN ADAMS; JOHN  
WOLCOTT; LUCY CLARK; SANDRA CAMP;  
DAVE CAMP; LARRY LESSNER; RUSSELL  
ZIEMBA; and ANNE SOMBOR,

**NOTICE OF MOTION  
FOR AMICUS CURIAE  
RELIEF**

*Respondents,*

- against -

Docket No.: 503697  
Albany County  
Index No.: 1783-06

THE COMMON COUNCIL OF THE CITY OF  
ALBANY; and THARALDSON DEVELOPMENT CO.,

*Appellants.*

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**PLEASE TAKE NOTICE**, that upon the annexed Affirmation of Marc S. Gerstman, Esq. dated July 22, 2009, the Affidavits of the chief executive officers of the proposed amici attached to the Motion as exhibit "A" and a proposed brief, dated July 22, 2009, attached to the Motion as Exhibit "B", Sierra Club Atlantic Chapter, Environmental Advocates of New York, Inc., Scenic Hudson, Inc., Natural Resources Defense Council, Inc., Long Island Pine Barrens Society, Inc. and Riverkeeper, Inc. (collectively "proposed amici") will move this Court at Court of Appeals Hall located at Eagle Street, Albany, New York 12203 on the 3 rd day of August, 2009 at 9:30 a.m., or as soon thereafter as the motion may be heard, pursuant to Uniform Rule 500.21 and 500.23 for an for an order granting the Motion for Amicus Curiae Relief and directing service of the proposed Amicus Brief and

such other and further relief this Court may deem proper, just and equitable.

This Motion is submitted on the papers and no personal appearance is required or permitted.

Dated: July 22, 2009  
Albany, New York

LAW OFFICE OF MARC S. GERSTMAN

By:   
\_\_\_\_\_  
Marc S. Gerstman, Esq.  
Cheryl A. Roberts, Esq., Of Counsel  
*Attorneys for Proposed Amici Curiae*  
Law Office of Marc S. Gerstman  
313 Hamilton Street  
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Assistant Solicitor General  
Office of the Attorney General  
Attorney for the Department of Environmental Conservation  
as *Amicus Curiae*  
The Capitol  
Albany, New York 12224

STATE OF NEW YORK  
COURT OF APPEALS

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In the Matter of SAVE THE PINE BUSH, INC.;  
LYNNE JACKSON; REZSIN ADAMS; JOHN  
WOLCOTT; LUCY CLARK; SANDRA CAMP;  
DAVE CAMP; LARRY LESSNER; RUSSELL  
ZIEMBA; and ANNE SOMBOR,

*Respondents,*

- against -

THE COMMON COUNCIL OF THE CITY OF  
ALBANY; and THARALDSON DEVELOPMENT CO.,

*Appellants.*

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**AFFIRMATION IN  
SUPPORT OF MOTION  
FOR AMICUS CURIAE  
RELIEF**

Docket No.: 503697  
Albany County  
Index No.: 1783-06

Marc S. Gerstman, being an attorney admitted to practice law in the State of New York affirms under penalty of perjury that:

1. I am the attorney for the proposed amici curiae and I am fully familiar with the facts and circumstances surrounding this case and the Motion for Amicus Curiae Relief. As a former Deputy Commissioner and General Counsel for the New York State Department of Environmental Conservation ("DEC"), (1988 through 1994) and DEC Attorney (1982-1988), and subsequently, as a private practitioner representing citizens, environmental groups and municipalities in environmental matters, I am fully familiar with the State Environmental Quality Review Act, ECL, Article 8 ("SEQRA") and the need for judicial oversight of executive agency decisions that adversely impact the environment.

2. The proposed amici curiae represent a broad public interest to protect the environment and natural resources that form the commons and sustain the planet.
3. The affidavits of the chief executive officers of the proposed amici attest that each of the organizations has a long history of commitment to and active participation in environmental and natural resource protection. The affidavits of Susan Lawrence, Chair, Sierra Club Atlantic Chapter, Alex Matthiessen, President and Hudson Riverkeeper at Riverkeeper, Inc., Edward Sullivan, President, Scenic Hudson, Inc., Robert Moore, Executive Director, Environmental Advocates of New York, Inc., Richard Amper, Executive Director, Long Island Pine Barrens Society, Inc. and Kate Sinding, Senior Attorney, Natural Resources Defense Council, Inc. are attached to the Notice of Motion as Exhibit "A".
4. The proposed amici will argue that Save the Pine Bush was properly granted organizational standing based on its mission, the long history of its activities to protect the Pine Bush Preserve and the injury in fact to its members who use and enjoy the Pine Bush Preserve resulting from the City of Albany action.
5. Subsequent to this Court's decision in Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991), access to the courts to redress violations of SEQRA has become more circumscribed and the burden for environmental organizations, civic groups and citizens to demonstrate standing has increased at considerable expense.

"In all, between the issuance of *Plastics* in 1991 and the end of 2001, 66 appellate decisions considered standing in SEQRA or related contexts. In these cases, standing was denied for all plaintiffs in 34 cases; standing was granted for all plaintiffs in 28 cases; and standing was granted for some but not all of the plaintiffs in four cases. Thus the cases were allowed to go forward in 32 of the 66 cases, or 48 percent - in contrast to 68 percent pre-*Plastics* decisions." *Ruzow, Gerrard and Weinberg, 2 Environmental Impact Review in New York, section 7.07 (2) (c) and (d), P7-88, (2008).*

6. This is due to vigorous objections to standing based on the lack of special harm different than that suffered by the general public. This has constrained individuals and organizations to expend significant additional resources prior to and at the expense of the airing of the substantive issues. See, *Ruzow, Gerrard and Weinberg, Environmental Impact Review in New York, section 7.07 (3) (B), (2008).*
7. The proposed amici will argue that there is no public policy purpose served by grafting the special harm requirement onto the test for standing for bona fide environmental organizations as set forth by the Court of Appeals in Matter of Dental Socy. v Carey, 61 N.Y.2d 330 (1984); Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1 (1974); and, Society of Plastics Industry Association, Inc. v County of Suffolk, 77 N.Y.2d 761 (1991).
8. Based on the substantial nexus between Save the Pine Bush and the resource it was organized to protect, the Court should conclude that Save the Pine Bush is an appropriate party to adjudicate whether the City of Albany complied with SEQRA in this matter.

9. The use and enjoyment of the Pine Bush Preserve by its members provides a substantial nexus that should be sufficient to grant Save the Pine Bush organizational standing without the requirement that it show injury in fact different than the injury suffered by the general public.

"Use and enjoyment of the site at issue is clearly sufficient to establish standing under NEPA and the same rule should apply under SEQRA, although the issue has not been extensively litigated." *Ruzow, Gerrard and Weinberg, Environmental Impact Review in New York, section 7.07 (3) (a), (2008).*

10. The proposed amici have a substantial and unique interest in this appeal. As set forth in the affidavits in support of the Motion, each organization is a bona fide environmental organization based on their respective long histories of actions dedicated to environmental protection and natural resource preservation on behalf of thousands of members.

11. In furtherance of the overall mission of these organizations, individual organization members contribute their time, money and other resources. These organizations, through their staffs and members, engage in fund raising activities; advocate for the protection of the natural resources that are the focus of the organization; participate in government actions, including regulatory and legislative activities, that have the potential to impact the natural resources that the organizations were formed to protect; and use, enjoy, monitor, research, study, protect and maintain the environmental resources which their organizations were formed to preserve.

12. The proposed amici curiae respectfully request that the Court of Appeals affirm the Decision of the Appellate Division, Third Department granting standing to the Petitioners-Respondents in Save the Pine Bush v. Common Council of the City of Albany, 56 A.D.3d 32 (3<sup>rd</sup> Dept. 2008).



Dated: July 22, 2009  
Albany, New York

Marc S. Gerstman, Esq.

## EXHIBIT A



## EXHIBIT A

### AFFIDAVITS SUBMITTED BY THE PROPOSED AMICI

1. Susan Lawrence, Chairperson, Sierra Club Atlantic Chapter
2. Alex Matthiessen, President and Hudson Riverkeeper, Riverkeeper, Inc.
3. Edward O. Sullivan, President, Scenic Hudson, Inc.
4. Robert Moore, President, Environmental Advocates of New York, Inc.
5. Richard Amper, President, Long Island Pine Barrens Society, Inc.
6. Kate Sinding, Senior Attorney, Natural Resources Defense Council, Inc.

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CO.,

*Appellants.*

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AFFIDAVIT IN  
SUPPORT OF  
MOTION FOR AMICUS  
CURIAE RELIEF

AFFIDAVIT OF SUSAN LAWRENCE

STATE OF NEW YORK     )  
COUNTY OF ALBANY    ) ss:

Susan Lawrence, being duly sworn, deposes and says:

1. I am the Chair of the Sierra Club Atlantic Chapter a 501(c)3/(c)4 non-profit environmental organization and have been in that position since 2008. In this capacity I help define the overall strategy of the organization, manage staff and campaigns, support the Chapter's Executive Committee, oversee our fundraising appeals, and represent the organization to the general public, elected officials and state agencies.
2. The Sierra Club is a national organization founded in 1892 and dedicated to exploring, enjoying, and protecting the wild places of the earth; practicing and

promoting the responsible use of the earth's ecosystem and resources; and educating and enlisting people to protect and restore the quality of the natural and human environment.

3. The Sierra Club Atlantic Chapter, founded in 1950, is a volunteer lead arm of the national organization representing 37,000 members throughout the state of New York and advocating on New York based environmental issues. Our office is located at 353 Hamilton Street, Albany, NY 12210.
4. The members of the Sierra Club Atlantic Chapter, with 11 groups across the state, have invested time and resources in campaigns to curb greenhouse gas emissions through efficiency and renewable energy sources, remove toxins from our environment, strengthen wetlands and habitat protection, preserve New York's remaining wild places, fight polluting energy facilities and challenge unwise land use decisions. To meet these goals the Chapter participates in lobbying and litigation to protect natural resources and occasionally employs scientific experts, lawyers, and other professionals as necessary to meet our objectives in this regard.
5. The Atlantic Chapter also sponsors wilderness hikes and outings as a means to engage our members with the natural world and educate the public of the need to protect our remaining open spaces. Our use and enjoyment of New York's parks, trails and waterways is met with our own investment in volunteer efforts to maintain trails and protect natural areas.
6. In conjunction with the National Sierra Club, the Atlantic Chapter has developed a framework of 6 priorities that will guide our work for the next

two years. These priority areas include: moving beyond coal, resilient habitats, clean energy solutions, global climate change, green transportation, and safeguarding communities.

7. To cover such broad and diverse campaigns requires the Atlantic Chapter to make significant investments of resources, including financial and in kind contributions of time and expertise on the part of individual volunteers and Chapter staff. The Atlantic Chapter currently employs 2 full time and 1 part time staff and has an annual operating budget of \$370,000. In addition to paid staff, the Atlantic Chapter is fortunate to have access to volunteer services of hundreds of individuals on a regular and sustained basis. Our volunteers write letters, attend hearings and rallies, organize lectures, lead hikes, create educational opportunities, lobby on legislative issues, and work in conjunction with other organizations to safeguard New York's environment.
8. The Sierra Club Atlantic Chapter's investment in, influence over and ability to protect New York's environmental assets since 1950 certainly makes it a bona fide environmental organization and surely meets the test set out by the Court of Appeals for identifying a bona fide organization in Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1 (1974).
9. Where governmental actions in violation of SEQRA threaten NYS resources in which the Atlantic Chapter has invested, the Chapter's interests and those of its members are harmed.
10. As more fully set forth in the proposed Brief of the Environmental Organization Amici, the Court of Appeals' decision in Society of the Plastics

Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991) and subsequent decisions by lower and intermediate courts in New York State have hampered the ability of bona fide organizations similar to the Atlantic Chapter from obtaining access to the judiciary when necessary to vindicate the rights of its members and the organization. This inability to obtain standing due to the imposition by the lower and intermediate courts of a demonstration of a “special harm” or injury different in kind or degree from the general public is problematic where the threatened resources are natural or environmental resources common and available to all people; Particularly where threatened natural resources may be on public property, but not near a residence or a residence inhabited by an individual willing or interested in vindicating the injury to the natural resources threatened, and access to the courts is hampered as there may be no one available or willing to take advantage of the special harm exemption provided to those living in close proximity to the threatened resources.

11. Where a bona fide environmental organization having no member in close proximity to the threatened resource can not obtain standing or where no private individual may seek to redress such a harm occasioned by a violation of SEQRA, governmental action in violation of a law intended to protect the environment may go unaddressed as SEQRA makes no provision for a private “attorney general” or for enforcement by the Attorney General or other governmental authority.

12. Given the organizational purposes of the Sierra Club, the priorities by which we operate, the members of the organization that are active in New York, the long standing efforts and activities engaged in by the Sierra Club and its members to carry out the organization's goal, the material social, economic and environmental interests that could be adversely affected, the Sierra Club Atlantic Chapter's ability to gain standing in a proceeding to enforce SEQRA to redress actions taken by governmental agencies in violation of SEQRA is crucially important.
13. These adverse impacts are all contrary to the interests of the Sierra Club Atlantic Chapter and its members.
14. The Sierra Club Atlantic Chapter therefore urges the Court of Appeals to affirm the Appellate Division, Third Department decision in Save the Pine Bush v. Common Council of the City of Albany, 56 A.D.3d 32 (3<sup>rd</sup> Dept. 2008) and in so doing, clarify that bona fide environmental organizations such as the Sierra Club Atlantic Chapter need not demonstrate "special harm" by its members, different in kind or degree from the general public in order to gain standing in a case where an environmental or natural resources are threatened which the Chapter members use and enjoy. Further, the Sierra Club Atlantic Chapter urges this Court up uphold standing by Save the Pine Bush in the instant matter also on the premise that as a matter of public policy, the "special harm" standing requirement should be eliminated from Article 78 proceedings seeking to redress a violation of SEQRA where an individual or organization can demonstrate an in fact injury to a natural resource within

SEQRA's zone of interest. Finally, the Atlantic Chapter urges this Court to find that Save the Pine Bush could have obtained standing to redress the threat to the Albany Pine Bush Preserve in its own behalf based upon the threat to Save the Pine Bush's substantial investment, financial or otherwise, in creating, protecting and maintaining the Pine Bush as set forth in Save the Pine Bush's Petition.

Date:

Susan Lawrence  
Susan Lawrence

Sworn before me this 22 day  
of July, 2008.

Stephanie A Lyon  
Notary Public

STEPHANIE A. LYON  
NOTARY PUBLIC, State of New York  
No. 01LY6005040  
Qualified in Albany County  
Commission Expires 4/06/20 10

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AFFIDAVIT OF ALEX MATTHIESSEN

STATE OF NEW YORK            )  
COUNTY OF WESTCHESTER ) ss:

Alex Matthiessen, being duly sworn, deposes and says:

1. I am the President and Hudson Riverkeeper at Riverkeeper, Inc. (hereinafter “Riverkeeper”), a 501(c)3 non-profit environmental organization, and have been in that position since 2000. In this capacity I develop the organization’s strategic goals and overall strategy, oversee the work of program managers and staff, oversee our fundraising appeals, and represent the organization to the general public, elected officials and state agencies.
2. Riverkeeper is a member-supported organization whose mission is to protect the ecological integrity of the Hudson River and its tributaries, and to safeguard the drinking water supply of New York City and the lower Hudson Valley. Riverkeeper began as the Hudson River Fishermen’s Association (HRFA), an environmental watchdog and enforcement organization founded by a group of concerned fisherman in 1966 under the leadership of Bob Boyle. In 1983 the HRFA launched a patrol boat, and hired John Cronin as the first full-time Hudson Riverkeeper, creating a Riverkeeper organization based on his work. The HRFA changed its name to Riverkeeper in 1986. Our office is located at 828 South Broadway, Tarrytown, NY 10591.
3. Riverkeeper currently has more than five thousand members who actively support the legal and policy initiatives undertaken to fulfill our mission and



strategic goals of making the Hudson a “fishable, swimmable” river once again, and to ensure that New York City residents have a clean, abundant source of drinking water. Throughout our forty year history, Riverkeeper has helped to establish globally recognized standards for waterway and watershed protection and serve as the model for the growing Waterkeeper movement that includes more than more than 180 Keeper programs across the country and around the globe.

4. Riverkeeper employs a variety of approaches to address environmental issues in the Hudson Valley, including litigation, environmental policy advocacy, and grassroots organizing. We also partner with other state, regional and national environmental organizations, and engage in collaborative, multi-year field studies and research projects with scientific and academic institutions such as the Lamont Doherty Earth Observatory at Columbia University, and Queens College of New York.
5. Many of Riverkeeper’s members actively support the work of our staff by acting as “Watchdogs” who report sightings or other evidence of illegal pollution of the Hudson and unregulated activity in the New York City watershed. Our members include boaters, recreational and commercial fishermen and others who regularly recreate on, and receive aesthetic enjoyment from the Hudson and within the land protecting the New York City watershed.
6. Riverkeeper’s participation in environmental litigation and policy advocacy requires significant financial resources. The organization currently has a staff

of twenty two full time employees, including seven attorneys, and an annual budget of approximately \$3 million. Based on this organization's mission, allocation of resources and consistent efforts to protect the environment in the Hudson Valley, Riverkeeper must be considered a bona fide environmental organization and meets the test set out by the Court of Appeals for identifying a bona fide organization in Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1 (1974).

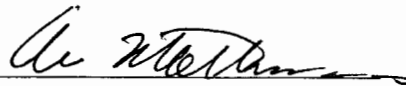
7. Where governmental actions in violation of SEQRA threaten resources in the Hudson Valley and the New York City watershed, the interests of Riverkeeper and its members are harmed. Throughout its history, Riverkeeper has participated in environmental reviews of a wide variety of proposed projects under SEQRA, including but not limited to power plant permitting proceedings, proposed waterfront development projects, and development projects within the New York City watershed. In many of these proposals, Riverkeeper has identified potential harms to the environment, such as entrainment and impingement of aquatic organisms, increased stormwater runoff, and restriction of public access to the Hudson shoreline. All of these impacts would harm Riverkeeper and its members. Riverkeeper has filed formal comments with the lead agencies for these projects, and has brought court challenges to governmental violations of SEQRA when necessary.
8. As more fully set forth in the proposed Brief of the Environmental Organization Amici, the Court of Appeals' decision in Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991) and subsequent

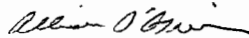
decisions by lower and intermediate courts in New York State have hampered the ability of bona fide organizations similar to Riverkeeper from obtaining access to the judiciary when necessary to vindicate the rights of its members and the organization. This inability to obtain standing due to the imposition by the Court of Appeals of a demonstration of a “special harm” or injury different in kind or degree from the general public is problematic where the threatened resources are natural or environmental resources common and available to all people.

9. Where a bona fide environmental organization having no member in close proximity to the threatened resource cannot obtain standing or where no private individual may seek to redress such a harm occasioned by a violation of SEQRA, governmental action in violation of a law intended to protect the environment may go unaddressed as SEQRA makes no provision for a private “attorney general” or for enforcement by the Attorney General or other governmental authority.
10. Riverkeeper therefore urges the Court of Appeals to affirm the Appellate Division, Third Department decision in Save the Pine Bush v. Common Council of the City of Albany, 56 A.D.3d 32 (3<sup>rd</sup> Dept. 2008) and in so doing, clarify that bona fide environmental organizations such as Riverkeeper need not demonstrate “special harm” by its members, different in kind or degree from the general public in order to gain standing in a case where an environmental or natural resources is threatened which Riverkeeper members use and enjoy. Further, Riverkeeper urges this Court up uphold standing by

Save the Pine Bush in the instant matter also on the premise that as a matter of public policy, the "special harm" standing requirement should be eliminated from Article 78 proceedings seeking to redress a violation of SEQRA where an individual or organization can demonstrate an in fact injury to a natural resource within SEQRA's zone of interest. Finally, Riverkeeper urges this Court to find that Save the Pine Bush could have obtained standing to redress the threat to the Albany Pine Bush Preserve in its own behalf based upon the threat to Save the Pine Bush's substantial investment, financial or otherwise, in creating, protecting and maintaining the Pine Bush as set forth in Save the Pine Bush's Petition.

Date: July 20<sup>th</sup>, 2009

  
Alex Matthiessen

Sworn before me this 20<sup>th</sup> day  
of July, 2009. 

  
Notary Public

**ALLISON N. O'BRIEN**  
Notary Public, State of NY  
No. 010B6102162  
Qualified in Westchester County  
Commission Expires Nov 24, 2011

AFFIDAVIT OF EDWARD O. SULLIVAN

STATE OF NEW YORK     )  
COUNTY OF DUTCHESS   ) ss:

Edward O. Sullivan, being duly sworn, deposes and says:

1. I am the President of Scenic Hudson, Inc., a 501(c)3 non-profit environmental organization and have been in that position since 1999. In this capacity I am responsible for all aspects of the sound management and operation of the organization.
2. Scenic Hudson was founded in 1963 to halt a destructive industrial project from being constructed on Storm King Mountain, a natural landmark on the Hudson River. The legal battle that ensued resulted in, among other things, what is now commonly known as the "Scenic Hudson Decision" that for the first time established the right of citizens to participate in public decision-making that affects the environment. Today Scenic Hudson is the largest environmental organization dedicated to protecting, preserving and restoring the Hudson and its riverfronts as public and natural resources.
3. Scenic Hudson is comprised of 47 full-time staff and has more than 25,000 members throughout the Hudson Valley. Scenic Hudson advocates on environmental issues related to conserving the region's nationally recognized landscapes, its economic prosperity and residents' quality of life. In 2008 Scenic Hudson became one of the first organizations in the U.S. to be awarded accreditation by the Land Trust Accreditation Commission, which indicates it has met national quality standards for land protection and has undergone an

extensive external review of its management, systems and policies. Our office is located at 1 Civic Center Plaza, Suite 200, Poughkeepsie, NY 12601-3157.

4. Scenic Hudson staff combines land conservation, citizen-based advocacy, land use planning tools and biological science to create environmentally and economically healthy communities, open up riverfronts to the public, protect irreplaceable wildlife habitat and preserve the valley's scenic beauty. To meet these goals Scenic Hudson participates in lobbying and litigation to protect natural resources and periodically employs scientific experts, lawyers and other professionals as necessary to meet our objectives in this regard.
5. Scenic Hudson has protected more than 27,000 acres and created or enhanced 40 public parks and preserves stretching from Westchester County to the Capital District. Within these parks, Scenic Hudson sponsors a regular series of free activities to connect the public with nature and educate them on the need to protect our remaining open spaces. In addition to these family-oriented activities, Scenic Hudson staff works with schools to create place-based environmental-education programs utilizing Scenic Hudson parks as "outdoor classrooms."
6. Scenic Hudson currently is engaged in a campaign to "Save the Land That Matters Most." Working with 16 fellow land trusts, as well as governments, businesses and individuals, the initiative seeks to protect 65,000 acres throughout the Hudson Valley deemed by New York State to be of the highest scenic, agricultural and ecological importance.

7. To achieve such broad and diverse goals requires Scenic Hudson to make significant investments of resources, including financial and in-kind contributions of time and expertise on the part of individual volunteers and staff. Scenic Hudson currently has an annual operating budget of \$4,734,000. In addition our members write letters, attend hearings and rallies, organize lectures and create educational opportunities.
8. Scenic Hudson's investment in, influence over and ability to protect New York's environmental assets since 1963 makes it a bona fide environmental organization and meets the test set out by the Court of Appeals for identifying a bona fide organization in Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1 (1974).
9. Where governmental actions in violation of SEQRA threaten resources in the Hudson Valley in which Scenic Hudson has invested, Scenic Hudson's interests and those of its members are harmed.
10. As more fully set forth in the proposed Brief of the Environmental Organization Amici, the Court of Appeals' decision in Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991) and subsequent decisions by lower and intermediate courts in New York State have hampered the ability of bona fide organizations similar to Scenic Hudson from obtaining access to the judiciary when necessary to vindicate the rights of its members and the organization. This inability to obtain standing due to the imposition by lower and intermediate Courts of a demonstration of a "special harm" or injury different in kind or degree from the general public is problematic where

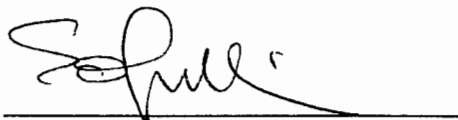
the threatened resources are natural or environmental resources common and available to all people. Particularly where threatened natural resources may be on public property, but not near residences or a residence inhabited by an individual willing or interested in vindicating the injury to the natural resources threatened, and access to the courts is hampered as there may be no one available or willing to take advantage of the special harm exemption provided to those living in close proximity to the threatened resources.

11. Where a bona fide environmental organization having no member in close proximity to the threatened resource cannot obtain standing or where no private individual may seek to redress such a harm occasioned by a violation of SEQRA, governmental action in violation of a law intended to protect the environment may go unaddressed as SEQRA makes no provision for a private “attorney general” or for enforcement by the Attorney General or other governmental authority.
12. Given the organizational purposes of Scenic Hudson, the priorities by which we operate, the members of the organization that are active in New York, the longstanding efforts and activities engaged in by Scenic Hudson and its members to carry out the organization’s goals, the material social, economic and environmental interests that could be adversely affected, Scenic Hudson’s ability to gain standing in a proceeding to enforce the SEQRA to redress actions taken by governmental agencies in violation of SEQRA.
13. These adverse impacts are all contrary to the interests of Scenic Hudson and its members.

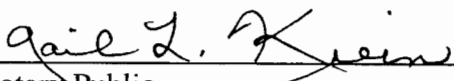


14. Scenic Hudson therefore urges the Court of Appeals to affirm the Appellate Division, Third Department decision in Save the Pine Bush v. Common Council of the City of Albany, 56 A.D.3d 32 (3<sup>rd</sup> Dept. 2008) and in so doing, clarify that bona fide environmental organizations such as Scenic Hudson need not demonstrate "special harm" by its members, different in kind or degree from the general public in order to gain standing in a case where an environmental or natural resource is threatened which Scenic Hudson members use and enjoy. Further, Scenic Hudson urges this Court to ~~up~~ *so* uphold standing by Save the Pine Bush in the instant matter also on the premise that as a matter of public policy, the "special harm" standing requirement should be eliminated from Article 78 proceedings seeking to redress a violation of SEQRA where an individual or organization can demonstrate an in fact injury to a natural resource within SEQRA's zone of interest. Finally, Scenic Hudson urges this Court to find that Save the Pine Bush could have obtained standing to redress the threat to the Albany Pine Bush Preserve in its own behalf based upon the threat to Save the Pine Bush's substantial investment, financial or otherwise, in creating, protecting and maintaining the Pine Bush as set forth in Save the Pine Bush's Petition.

Date:

  
Edward O. Sullivan

Sworn before me this 21<sup>st</sup> day  
of July, 2009.

  
Notary Public  
GAIL L. KREIN  
Notary Public, State of New York  
No. 01KR6111621  
Qualified in Ulster County  
Commission Expires June 14, 2012

STATE OF NEW YORK  
COURT OF APPEALS

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AFFIDAVIT IN  
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*Respondents,*

- against -

THE COMMON COUNCIL OF THE CITY OF  
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CO.,

*Appellants.*

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AFFIDAVIT OF ROBERT J. MOORE

STATE OF NEW YORK     )  
COUNTY OF ALBANY    ) ss:

Robert J. Moore, being duly sworn, deposes and says:

1. I am the Executive Director of Environmental Advocates of New York, a 501(c)3 non-profit conservation organization and have been in that position since 2004. In this capacity I define the overall strategy of the organization, manage staff and campaigns, raise funds, support the board of directors, and represent the organization to the media, the general public, elected officials and state agencies.
2. Environmental Advocates of New York's mission is to protect our air, land, water and wildlife and the health of all New Yorkers. Based in Albany, we monitor state government, evaluate proposed laws, and champion policies and

practices that will ensure the responsible stewardship of our shared environment. We work to support and strengthen the efforts of New York's environmental community and to make our state a national leader. Environmental Advocates of New York (hereafter referred to as Environmental Advocates) is also the New York affiliate of the National Wildlife Federation. Environmental Advocates has 7,000 members from across the state. Our office is located at 353 Hamilton Street, Albany, NY 12210.

3. Environmental Advocates was founded in 1969 as an umbrella group representing the interests of New York State environmental organizations in the State Capital. Known then as the Environmental Planning Lobby, board members consisted of officers from several "member" organizations. Today, Environmental Advocates relies on an independent and self-governing board of directors, and members are citizens with an interest in the organizations' advocacy agenda. Our efforts have been instrumental in passing some of New York's most significant environmental laws, including: the state's original bottle deposit law; the nation's first acid rain law; the State Environmental Quality Review Act (SEQRA); the Environmental Protection Act; as well as the 1996 Clean/Water/Clean Air Bond Act.
4. Environmental Advocates' program areas currently include: working to reduce the emissions that contribute to global climate change; ensuring that state agencies responsible for implementing environmental laws have the

resources necessary to effectively implement them; as well as to ensuring the protection of New York State's water and natural resources.

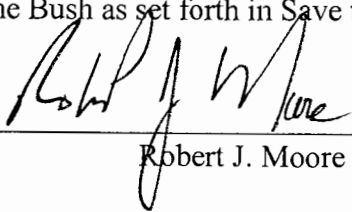
5. These efforts entail significant investments of resources by Environmental Advocates. Environmental Advocates currently employs 12 full-time staff and has an annual operating budget is \$912,641, of which more than \$727,000 is budgeted for program work.
6. Environmental Advocates' investment in, influence over, and ability to protect New York's environmental assets since 1969 make it a bona fide environmental organization and surely meets the test set out by the Court of Appeals for identifying a bona fide organization in Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1 (1974).
7. Where governmental actions in violation of SEQRA threaten natural resources throughout the state, Environmental Advocates' interests and those of its members are harmed.
8. As more fully set forth in the proposed Brief of the Environmental Organization Amici, the Court of Appeals' decision in Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991) and subsequent decisions by lower and intermediate courts in New York State have hampered the ability of bona fide organizations similar to Environmental Advocates from obtaining access to the judiciary when necessary to vindicate the rights of such organizations and their members. This inability to obtain standing due to the imposition by the Court of Appeals of a demonstration of a "special harm" or injury different in kind or degree from the general public is

problematic where the threatened resources are natural or environmental resources common and available to all people. This is particularly so where threatened natural resources may be on public property, but not near a residence or a residence inhabited by an individual willing or interested in vindicating the injury to the natural resources threatened, and access to the courts is hampered as there may be no one available or willing to take advantage of the special harm exemption provided to those living in close proximity to the threatened resources.

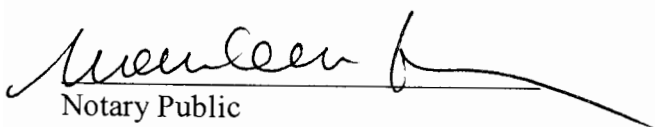
9. Where a bona fide environmental organization having no member in close proximity to the threatened resources can not obtain standing or where no private individual may seek to redress such a harm occasioned by a violation of SEQRA, governmental action in violation of a law intended to protect the environment may go unaddressed as SEQRA makes no provision for a private “attorney general” or for enforcement by the Attorney General or other governmental authority.
10. Given the mission of Environmental Advocates and its program areas, the long-standing efforts and activities engaged in by Environmental Advocates, the material social, economic and environmental interests that could be adversely affected, Environmental Advocates should have the ability to gain standing in a proceeding to enforce the SEQRA to redress actions taken by governmental agencies in violation of SEQRA.
11. These adverse impacts by SEQRA violations are all contrary to the interests of Environmental Advocates and its members.

12. Environmental Advocates therefore urges the Court of Appeals to affirm the Appellate Division, Third Department decision in Save the Pine Bush v. Common Council of the City of Albany, 56 A.D.3d 32 (3<sup>rd</sup> Dept. 2008) and in so doing, clarify that bona fide environmental organizations such as Environmental Advocates need not demonstrate “special harm” by its members, different in kind or degree from the general public in order to gain standing in a case where an environmental or natural resources is threatened which its members use and enjoy. Further, Environmental Advocates urges this Court to uphold standing by Save the Pine Bush in the instant matter also on the premise that as a matter of public policy, the “special harm” standing requirement should be eliminated from Article 78 proceedings seeking to redress a violation of SEQRA where an individual or organization can demonstrate an in fact injury to a natural resource within SEQRA’s zone of interest. Finally, Environmental Advocates urges this Court to find that Save the Pine Bush could have obtained standing to redress the threat to the Albany Pine Bush Preserve in its own behalf based upon the threat to Save the Pine Bush’s substantial investment, financial or otherwise, in creating, protecting and maintaining the Pine Bush as set forth in Save the Pine Bush’s Petition.

Date: 7/23/09

  
Robert J. Moore

Sworn before me this twenty second day of June, 2009.

  
Notary Public

**MARC S. GERSTMAN**  
Notary Public, State of New York  
No. 02GE5058278  
Qualified In Rensselaer County  
Commission Expires April 8, 2010

STATE OF NEW YORK  
COURT OF APPEALS

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In the Matter of SAVE THE PINE BUSH, INC.; AFFIRMATION IN  
LYNNE JACKSON; REZSIN ADAMS; JOHN SUPPORT OF  
WOLCOTT; LUCY CLARK; SANDRA CAMP; MOTION FOR AMICUS  
DAVE CAMP; LARRY LESSNER; RUSSELL CURIAE RELIEF  
ZIEMBA; and ANNE SOMBOR,

*Respondents,*

THE COMMON COUNCIL OF THE CITY OF  
ALBANY; and THARALDSON DEVELOPMENT  
CO.,

*Appellants.*

---

AFFIDAVIT OF RICHARD AMPER

STATE OF NEW YORK    )  
COUNTY OF SUFFOLK   ) ss:

Richard Amper, being duly sworn, deposes and says:

1.     I am Executive Director of the Long Island Pine Barrens Society, a 501(c)(3) non-profit environmental education and advocacy organization, founded in 1977 to protect drinking water and preserve critical habitat in Long Island's premier ecosystem, the Long Island Pine Barrens. I have held this position since 1989. In this capacity I devise the strategy of the organization, oversee all program functions and communicate to the public at large about the need to preserve the Pine Barrens and the work of the organization. I reside in the Town of Brookhaven, County of Suffolk and State of New York.

2. The Long Island Pine Barrens Society Inc., (“the Society”), is a corporation under Section 402 of the Not-For-Profit Law of the State of New York, with its office located at 547 East Main Street, Riverhead, New York. The Society is a 32 year-old private, not-for-profit environmental education and advocacy organization exempt from federal taxes under Section 501(c)(3) of the Internal Revenue Service Code. The purposes of the Long Island Pine Barrens Society (hereafter referred to as “The Society”) as set forth in the Certificate of Incorporation dated March 15, 1984 are as follows:

“...The purposes for which the corporation is formed are: to maintain a center for Regional Field naturalists, botanists, ecologists, zoologists, and scientists involved in serious field research on Long Island Pine Barrens; to promote and support research and all aspects of knowledge of the Long Island Pine Barrens; to support and maintain publication and other written outlets for the products of research on the Long Island Pine Barrens and related natural regions; to provide information to the general public and the scientific community about all aspects of the Long Island Pine Barrens; to provide scientific and technical data and interpretations about conservation of the Long Island Pine Barrens to the general public; to acquire and preserve tracts of natural Pine Barrens and other land on a forever-wild basis; to disseminate information to provide programs to the general public on sound conservation principles, as they relate to the Long Island Pine Barrens; to provide opportunities and forums for discussion of and dissemination of information to the general public about the biology, ecology, geology, archeology, anthropology and other aspects of the Long Island Pine Barrens, including its conservation, preservation, or management; to conduct meetings and other assemblies related to the above-state purposes; to conduct and carry on the activities of the Corporation in any state or territory of the United States or in any foreign country in conformity with the laws of said state, territory, or foreign country; and to do any other act or thing incident or connected with the foregoing purposes of or intent thereof, but not for the pecuniary profit or financial gain of members, directors, or officers of the corporation except to the extent permitted under the Not-for-Profit Corporation Law.”

3. The Long Island Pine Barrens is very similar to the Albany Pine Bush in its functional ecology. The Long Island Pine Barrens Society is similar to Save the Pine Bush in



its singular and prominent role in defending these ecosystems for the enjoyment of its members and the public at large.

4. The Long Island Pine Barrens Society has been the leading educator and protector of the Long Island Pine Barrens which sit atop the greatest quantities of the purest drinking water anywhere on Long Island and boasts the greatest diversity of plant and animal species anywhere in New York State. The Society was instrumental in creation of the Pine Barrens Protection Act of 1993, as amended (ECL 57).

5. The Society is a voting member of the Central Pine Barrens Advisory Committee, statutorily authorized by New York State Environmental Conservation Law, ECL 57-0119(9), to actively assist and advise the Central Pine Barrens Joint Planning and Policy Commission on matters pertaining to drinking water protection and habitat preservation in the Central Pine Barrens of Long Island protected by state statute (The Pine Barrens Protection Act of 1993, Environmental Conservation Law ECL 57.)

6. In its defense of the Long Island Pine Barrens, the Society has been required to sue in New York State Supreme Court for violations both of the State Environmental Quality Review Act and of the Pine Barrens Act. In three cases between 1995 and 2001, the Society was denied standing, while on other occasions, the Society was granted standing. The Society was denied standing in Long Island Pine Barrens Society v. Town of Brookhaven, 213 A.D. 2d 484, 623 N.Y.S.2d 613 (2<sup>nd</sup> Dept. 1995), Long

Island Pine Barrens Society v. Town of Islip, 261 A.D.2d 474, 690 N.Y.S.2d 95 (2<sup>nd</sup> Dept. 1999,) and in Long Island Pine Barrens Society v. Town of East Hampton 293 A.D. 2d 616, 741 N.Y.S. 2<sup>nd</sup> A.D (2<sup>nd</sup> Dept. 2002). Yet, the Pine Barrens Society has been granted standing in ten other cases.

7. Despite its long history of advocacy for this ecosystem and the unique role the Society has played in its protection, different judges have interpreted SEQRA standing requirements differently, so that in case after case, our organization never knew whether or not the merits of our case would ever be reached.

8. The Long Island Pine Barrens is comprised of 105,000 acres, much of it undeveloped. Thus, there were often no members of the Society, nor members of the public at large that lived in the immediate vicinity of the development application that threatened either drinking water or habitat or both. As a result, the quality of drinking water for thousands of Long Islanders was jeopardized because no individual resided proximate to the challenged application.

9. The Society has spent more than \$100,000 in court to protect the ecosystem after which it was named and has frequently been deterred from its work by lower court confusion over the standards for standing in the New York Court system. Our organization has relied on the clear language of Society of Plastics that the petitioners in that action were denied standing because they were bringing an economic claim under an environmental statute and not because of any need to show "special harm," but different

courts interpreted cases in different manners. Public service organizations such as ours would benefit from the Court of Appeals clarifying this matter once and for all, so that we may properly and responsibly use the State Environmental Quality Review Act for the purposes intended.

10. The Long Island Pine Barrens Society urges this Court to find that Save the Pine Bush has obtained standing to redress the threat to the Albany Pine Bush Preserve in its own behalf based upon the threat to Save the Pine Bush's substantial investment, financial and otherwise, in protecting, preserving and advocating on behalf of the Albany Pine Bush as set forth in Save the Pine Bush's Petition.

Dated: 7/21/09

  
Richard Amper

Sworn before me this 21st day of

July 2009.  
Rosemary Danielowich

Notary Public

ROSEMARY DANIELOWICH  
Notary Public, State of New York  
No. 01DA5060707  
Qualified in Suffolk County  
Commission Expires May 20, 2010

## EXHIBIT B

STATE OF NEW YORK  
COURT OF APPEALS

Oral Argument Requested

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In the Matter of SAVE THE PINE BUSH, INC.;  
LYNNE JACKSON; REZSIN ADAMS; JOHN  
WOLCOTT; LUCY CLARK; SANDRA CAMP;  
DAVE CAMP; LARRY LESSNER; RUSSELL  
ZIEMBA; and ANNE SOMBOR,

*Respondents,*

THE COMMON COUNCIL OF THE CITY OF  
ALBANY; and THARALDSON DEVELOPMENT  
CO.,

*Appellants.*

---

**PROPOSED AMICUS BRIEF**

Submitted by Sierra Club Atlantic Chapter, Environmental  
Advocates of New York, Scenic Hudson, Inc., Natural Resources  
Defense Council, Riverkeeper, Inc. and the LI Pine Barrens  
Society, Inc.

Cheryl A. Roberts, Esq.  
Marc S. Gerstman, Esq.  
*Attorneys for the Proposed Amici Curiae*  
The Law Office of Marc S. Gerstman  
313 Hamilton Street  
Albany, New York 12210

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## PRELIMINARY STATEMENT

The Sierra Club Atlantic Chapter, Natural Resources Defense Council, Riverkeeper, Inc., Environmental Advocates of New York, Scenic Hudson, Inc., and the LI Pine Barrens Society, Inc. (hereinafter the "proposed amici") respectfully submit this brief on motion pursuant to New York Rules of Court, §500.23(a)(1), urging the New York Court of Appeals to affirm the Decision of the Appellate Division, Third Department, dated October 9, 2008, holding that petitioner-respondent Save the Pine Bush, Inc., has standing to maintain this Article 78, CPLR proceeding to vindicate violations of the State Environmental Quality Review Act, ECL, Article 8 ("SEQRA"), by the City of Albany Common Council. (A. 9) The proposed amici submit this brief on the question whether Save the Pine Bush has standing to maintain this action.

The Court should affirm that Save the Pine Bush demonstrated organizational based on this Court's statement of the criteria for organizational standing set forth in Matter of Dental Socy. v Carey, 61 N.Y.2d 330 (1984) and Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1 (1974). In Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991), the Court stated that bona fide environmental organizations should be granted standing based on an injury in

fact, that will impact the use and enjoyment of the members of the organization, within the zone of interest sought to be protected by the statute.

Guidance from the Court would provide necessary clarity since several lower and intermediate appellate court decisions, have misapplied the special harm criterion to environmental organizations seeking to vindicate in fact injuries to environmental resources protected by SEQRA in addition to the substantial resources that have been expended to litigate the issues. [1] The proposed amici respectfully request that the Court affirm the Decision below in order to provide the necessary checks and balances for executive agency and local government decision making. As this Court stated in a case involving citizen taxpayer standing pursuant to State Finance Law § 123 (b) (1):

"Actions of this type can serve as a means for citizens to ensure the continued vitality of the constraints on power that lie at the heart of our constitutional scheme (*cf.* Matter of Dairylea Coop. v Walkley, 38 NY2d 6, 10 [1975] Committee for an Effective Judiciary v State, 209 Mont 105, 112-113, 679 P2d 1223, 1227 [1984]; State ex rel. Howard v Oklahoma Corp. Commn., 614 P2d 45, 52 [Okla 1980]). Thus, where a denial of standing would pose "in effect ... an impenetrable barrier to any judicial scrutiny of

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[1] See, e.g., Save the Pine Bush, Inc. v. Planning Bd. of Town of Clifton Park, 50 A.D.3d 1296 (3<sup>rd</sup> Dept. 2008); NYC Environmental Justice Alliance v Giuliani, 50 F. Supp 2d 250 (SDNY) aff'd 184 F. 3d 206 (2<sup>nd</sup> Cir. 1999); Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Town of Brookhaven, 213 A.D.2d 484 (2d Dept., 1995); West Branch Conservation Association, Inc. v. Planning Board of the Town of Clarkstown, 207 AD 2d 837 (2d Dept.1994); Croton Watershed Clean Water Coalition, Inc. v. Planning Board of the Town of Southeast, 2 Misc. 3d 1010 (Sup. West. 2004).

legislative action," our duty is to open rather than close the door to the courthouse." (citations omitted) Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801 815 (2003).

The proposed amici request that the Court reaffirm in this matter that the public policy of the State of New York favors access to the courts by environmental organizations challenging government actions made in alleged violation of the requirements of SEQRA, a broad statute enacted to protect the state's natural resources and the environment.

#### **QUESTIONS PRESENTED**

1. Whether Save the Pine Bush, a bona fide environmental organization, has standing to challenge the City of Albany's compliance with SEQRA based on the injury in fact to the use and enjoyment of the Albany Pine Bush Preserve, a natural resource within SEQRA's zone of interest.

Answer: Save the Pine Bush has standing as a bona fide environmental organization and meets the two part test articulated in Society of Plastics, *supra*, based on the injury in fact sustained by its members to the use and enjoyment of the natural resources in the Albany Pine Bush Preserve which fall squarely within the zone of interest sought to be protected by SEQRA.

2. Whether imposition of the special harm standing requirement, a vestige of public nuisance law, is proper in

Article 78 proceedings seeking to enforce compliance with SEQRA.

Answer: Save the Pine Bush should not be required to demonstrate special harm different in kind or degree from the general public since the premise underlying the special harm requirement derives from the public nuisance law which is inapposite to the issues presented in proceedings challenging SEQRA compliance.

3. Whether an environmental organization challenging compliance with SEQRA must demonstrate special harm in legal actions arising out of SEQRA and zoning or land use.

Answer: Standing in a combined challenge to land use decisions and SEQRA compliance should not be contingent on a finding of special harm different than the injury suffered by the general public as SEQRA's mandate and statutory focus on environmental impacts is much broader than, and distinct from, standards in local zoning laws.

4. Whether Save the Pine Bush as a bona fide environmental organization has standing to sue for injury to the Albany Pine Bush Preserve within SEQRA's zone of interest based on its substantial nexus with the Preserve.

Based on the substantial nexus between Save the Pine Bush and the Albany Pine Bush Preserve and its long standing dedication to the creation, protection and maintenance of

the Albany Pine Bush Preserve, Save the Pine Bush should be granted standing.

## STATEMENT OF THE CASE

Save the Pine Bush Inc., ("SPB") a not-for-profit organization organized under the laws of the State of New York in 1978 (A. 72) and nine of its individual members, on May 5, 2006, filed an Article 78, CPLR proceeding to vacate and annul a determination of the City of Albany Common Council, for violations of SEQRA. Save the Pine Bush alleged that the City of Albany failed to take the requisite "hard look" under SEQRA at the off site impacts from the proposed Marriot Hotel development on the rare and endangered species residing in and near the Pine Bush Preserve. (A. 81) The gravamen of Petitioners-Respondents' claim lies in SEQRA and the alleged significant adverse environmental impacts to the Albany Pine Bush Preserve ("Preserve") and the rare and endangered plants and animals that rely on the Preserve for habitat. (A. 72) The impact to the Pine Bush Preserve, cognizable under SEQRA, is precisely within the scope of Save the Pine Bush's mission.

On the issue of standing, the Appellate Division, Third Department, found that the organization has a long history of protecting the Preserve and its natural resources including the Karner Blue Butterfly, an endangered species in New York State listed in 6 NYCRR 186.2 (iv). Save the Pine Bush v. Albany City Council, 56 A.D.3d 32, 39-40 (3<sup>rd</sup> Dept. 2008), (A. 17). The nine individual Petitioners-Respondents, as members of Save the



Pine Bush, have been actively engaged in efforts by and on behalf of Save the Pine Bush to accomplish the organization's mission, including speaking at hearings, reviewing and commenting on development plans, organizing fund raisers to support preservation and protection of the Preserve and, where necessary, litigation. (A. 72) Each of the individual Petitioners-Respondents use and enjoy the natural resources in the Albany Pine Bush Preserve. (A. 72) Petitioners-Respondents will suffer injury to and loss of their use and enjoyment of the natural resources of the Preserve as a result of the violations of SEQRA which may cause injury to or extirpation of the Karner Blue Butterfly and other rare and endangered species inhabiting the Preserve. (A. 72)

The proposed amici respectfully refer the Court to the procedural history of the case set forth in Petitioners-Respondents' brief on appeal. Based in part on Save the Pine Bush's long history of and dedication to protecting the Preserve, the court concluded that the use and enjoyment of a public resource by individual members of Save the Pine Bush was sufficient proof to establish an injury-in-fact different in kind from the general public within the zone of interest of SEQRA. (A. 15)

## ARGUMENT

**Save the Pine Bush, a Bona Fide Environmental Organization, Has Standing to Challenge the City of Albany's Compliance with SEQRA Based On the Injury in Fact to the Use and Enjoyment of the Pine Bush Preserve, A Natural Resource Within SEQRA's Zone of Interest.**

The Court of Appeals prescribed three criteria that must be met in order for an organization to bring an action or proceeding on behalf of its members.

"*First*, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. *Second*, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. *Third*, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members." Matter of Dental Socy. v Carey, 61 N.Y.2d 330 (1984)

In Society of Plastics, supra, the Court further refined the criteria for organizational standing applicable to a bona fide environmental organization. The Court stated that injury to the use and enjoyment of a natural resource may be sufficient.

Factually, this case presents a variation from the more common scenario of associations dedicated to environmental preservation seeking to represent the interests of persons threatened with environmental harm (*see, e.g., Save a Valuable Envt. v City of Bothell*, 89 Wash 2d 862, 576 P2d 401; Sierra Club v Morton, 405 US Cal.727(U.S.Cal.1972) In such instances, in-fact injury within the zone of interest of environmental statutes has been established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural

resources (*see, e.g., United States v Students Challenging Regulatory Agency Procedures*, 412 US 669, 687).” Society of the Plastics Indus, 77 N.Y.2d at 775-776

The question raised in this matter is whether in meeting the first criterion, *Save the Pine Bush*, as a bona fide environmental organization, must demonstrate injury in fact to the use and enjoyment of its members, as suggested by this Court in Society of Plastics, or special harm different than the injury suffered by the general public, as concluded by several courts seemingly in opposition to the Court’s decision in Society of Plastics.

In Society of Plastics, the Court concluded that the trade organization seeking standing, was not one whose asserted interests were germane to the statutory purpose of SEQRA, and therefore it did not meet the second criteria of the test articulated in Dental Society for organizational standing. Society of Plastics Indust., Inc., 77 N.Y.2d at 776. *See also, Mobil Oil Corp. v. Syracuse Indus. Development Agency*, 76 N.Y.2d 428 (1990) (Mobil Oil Corp. was not a proper party to bring an action to enforce compliance with SEQRA)

Unlike the trade organization in Society of Plastics, *supra*, which sought redress for, inter alia, alleged economic injuries relying on SEQRA, *Save the Pine Bush*, as a bona fide environmental organization, meets all three criteria for

organizational standing set forth in Dental Society, *supra*, as applied by the Court in Society of Plastics, *supra*.

This Court's reliance on Bothell and Sierra Club v Morton in Society of Plastics argues persuasively that Save the Pine Bush need only show injury to the use and enjoyment of the resource by its members. Based on Society of Plastics, it appears that this Court never intended that a bona fide environmental organization would have to demonstrate special harm to its members different than the harm suffered by the general public, but instead opted for the federal rule on standing for environmental organizations. See, Save a Valuable Emt. v. City of Bothell, 89 Wash 2d at 868, *stating*, "We adopt the federal approach to the requirements of standing to gain review of this zoning action."

Nevertheless, intermediate appellate and lower courts have inconsistently applied the criteria set forth by this Court for environmental organization standing. In some cases, the special harm requirement has been an insurmountable obstacle to bona fide environmental groups who have sought, and been denied standing to enforce SEQRA's mandates. See *eg.*, Save the Pine Bush, Inc. v. Planning Bd. of Town of Clifton Park, 50 A.D.3d 1296 (3<sup>rd</sup> Dept. 2008); Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Town of Brookhaven, 213 A.D.2d 484 (2d Dept.,

1995); Wyman v. Braman, 298 A.D.2d 787 (3<sup>rd</sup> Dept. 2002), *appeal dismissed*, 99 N.Y.2d 578 (2003).

The decision of the Appellate Division, Third Department in Otsego 2000, Inc. v. Planning Bd. of Town of Otsego, 171 A.D.2d 258 (3<sup>rd</sup> Dept. 1991), *lv. denied*, 79 N.Y.2d 753 (1992) illustrates the seeming confusion surrounding this Court's statements on organizational standing. Although the court correctly stated the criteria in Society of Plastics, *supra*, that environmental organizations need only show injury in fact to the use and enjoyment of the resource by its members, it wrongly denied standing based upon the special harm requirement:

"Rather, petitioner appears to be an organization dedicated to environmental preservation seeking to represent persons who are concerned with environmental and related land use issues. 'In such instances, in-fact injury within the zone of interest of environmental statutes has been established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources.'" Otsego 2000, Inc. v. Planning Bd. of Town of Otsego, *supra* at 261 (citing Society of Plastics, *supra*)

Ultimately, the Otsego court denied organizational standing to Otsego 2000, Inc., blurring the lines between the criteria for individual standing for land use matters that seemingly required a showing of special harm and organizational standing for bona fide environmental organizations which the proposed amici contend, should not. The court concluded that the record was,

"devoid of any claim of specific cognizable harm, environmental or otherwise" and that "petitioner's allegations can be characterized at best as generalized claims of harm *no different in kind or degree from the public at large*, which are insufficient for standing purposes." *Id.* [emphasis supplied].

The Appellate Division, Third Department is not alone in applying the special harm requirement to environmental organizations challenging governmental decision making for violations of SEQRA. Citing the many similar cases in the dissenting opinion in Save the Pine Bush, 56 A.D.3d at 46, Justice Mecure queried, how the majority could align its position with the:

"[l]ine of cases that, following Society of Plastics Indus., have required individual petitioners to demonstrate special harm to their own individual rights despite their membership in organizations that have shown similar commitment to the protection and preservation of the natural and cultural resources."

The answer may be found in the common thread in the Court's decisions on the requirements for organizational standing in challenges to SEQRA compliance.

In Mobil Oil Corp. v SIDA, *supra*, and Society of Plastics, *supra*, the Court determined that the goals and purposes of the entities bringing the challenges were unrelated to environmental protection and the injuries sought to be redressed were economic in nature. The stringent application of the criteria for organizational standing properly excluded Mobil Oil Corp. and the Society of Plastics from relying on SEQRA to protect their

economic interests. See, Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead, 69 N.Y.2d 406 (1987)

Unfortunately, as a consequence of the holdings in Mobil Oil Corp. v SIDA, *supra*, and Society of Plastics, *supra*, lower and intermediate courts have unduly limited standing by wrongly applying the special harm standing requirement applicable to non-environmental organizations challenging SEQRA compliance to environmental organizations that otherwise satisfy the criteria in Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1 (1974) and Matter of Dental Socy. v Carey, 61 N.Y.2d 330 (1984).

The criteria for organizational standing articulated by this Court in Society of Plastics for a bona fide environmental organization to show injury in fact to the use and enjoyment of its members adheres to the two part inquiry for standing announced by this Court in Douglaston v. Galvin, *supra*, and in Matter of Dairylea Coop.. According to this inquiry, Save the Pine Bush should be afforded standing by, "show[ing] that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute." Matter of Dairylea Coop. v. Walkley, 38 N.Y.2d at 9

Application of the two part standing test for environmental organizations to Save the Pine Bush should turn on the self

evident proposition that a bona fide environmental organization whose members use and enjoy threatened natural resources within the zone of interest sought to be protected by an environmental statute, are "presumptively adversely affected" by the challenged action making a "showing of special damage or actual injury... not always necessary to establish a party's standing." *Cf.*, Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524 (1989). Where members of a bona fide environmental organization's use and enjoyment of threatened environmental resources protected by SEQRA are alleged, "aggrievement can be inferred". *Cf.* Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead, 69 N.Y.2d 406 (1987); Saratoga Lake Protection & Improvement District v City of Saratoga Springs, 46 AD 3d 979 (3d Dept. 2007) (inference of aggrievment based on the proximity of the petitioner to the proposed action being challenged); *But cf.* Barrett v Dutchess County Legislature, 38 AD 3d 651 (2d Dept. 2007)

The two-part standing test to determine the standing of environmental organizations assures the Court that the proper parties will be present and the issues will be fully adjudicated. In determining questions of standing, this Court has stated that "[w]hether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation."



Dairyalea Cooperative, Inc. v. Walkley, 38 N.Y.2d at 9 (1975).

The primary test for ensuring that the proper party is before the court is the "zone of interest", which

"was formulated to ascertain the petitioner's status without necessarily dealing with the merits of the litigation. A petitioner need only show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute." *Id.*

Unlike the organizations in Society of Plastics, *supra*, Mobil Oil Corp., *supra*, Save the Pine Bush, a bona fide environmental organization, is a proper party since the purpose of the organization and the injury sustained are germane to SEQRA's "zone of interest" to protect the environment.

Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1 (1974)

**A. Save the Pine Bush Need Not Show That One of its Members Has Sustained a Special Harm or Injury Different in Kind from the Public at Large Because the Special Harm Requirement Is a Vestige of Public Nuisance Law Which Should Be Inapplicable to SEQRA Challenges**

The special harm requirement should not be applied in the circumstances of this case to add an additional hurdle for Save the Pine Bush to obtain standing. Although Save the Pine Bush was properly granted standing based on its widely recognized role in seeking protection for the Pine Bush Preserve and the

injury to the use and enjoyment of the Preserve by its members, Appellants-Respondents would have this Court inappropriately apply the requirement for special harm.

The special harm requirement commonly applied in challenges to land use decisions, and ultimately SEQRA cases[5], derives from public nuisance law, where courts required plaintiffs suing for damages arising out of a public nuisance related to land use, to demonstrate an injury different in kind than the general public. *Cf.*, Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead, 69 N.Y.2d at 413, (*stating*, "Aggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of defendants (or respondents), or--put another way-- that it has sustained special damage, different in kind and degree from the community generally"); Cord Meyer Development Co. v. Bell Bay Drugs, Inc., 20 N.Y.2d 211, 217 (1967); Callanan v. Gilman, 107 N.Y. 360, 370 (1887); Graceland Corp. v. Consolidated Laundries Corp., 7 A.D.2d 89, 91 (4<sup>th</sup> Dept., 1958), *affirmed*, 6 N.Y.2d 900, 190 N.Y.S.2d 708 (1959) (*cited in Cord* and *stating*, "In the absence of special damage to another, such public nuisance is subject only to correction at the hands of

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[5] In Mobil Oil Corp. v. Syracuse Indus. Development Agency, 76 N.Y.2d 428 (1990), this Court denied standing to Mobil Oil Corp. finding that Mobil's alleged injury was economic and therefore it would not suffer an alleged injury in fact within the zone of interest sought to be protected by SEQRA.. The Court expressed concern that Mobil was not a proper party to adjudicate SEQRA issues.

public authority. It is equally clear, however, that one who suffers damage or injury, beyond that of the general inconvenience to the public at large, may recover for such nuisance in damages or obtain injunction to prevent its continuance. This is old law.");

Demonstration of a special harm in public nuisance cases is premised on the theory that public nuisance is a violation against the state and subject to redress by the state. 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 N.Y.2d 280, 292 (2001).

"A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority [citation omitted]." See also, Wakeman v. Wilbur, 147 N.Y. 657, 663-664 (1895)

The rationale underlying the imposition of the special harm requirement in public nuisance matters and ultimately land use decision making does not apply to actions challenging government compliance with SEQRA when it is commenced by a bona fide environmental organization under the circumstances in this matter.

Ironically, imposition of the special harm requirement to a challenge to compliance with SEQRA based on its broad mandate

for environmental protection is fundamentally at odds with SEQRA; a statute wholly concerned with adoption of and compliance *by the government* with a framework within which to make governmental decisions, taking into account environmental considerations. Jackson v. New York State Urban Development Corp., 67 N.Y.2D 400 (1986). Where a governmental agency does not follow the letter of SEQRA's law, as in the instant matter, there is no other governmental body charged with overseeing compliance with SEQRA's mandate, whether or not the "damage or injury is common to the public and special to no one." Wakeman v. Wilbur, 147 N.Y. at 663-664.

The special harm requirement also addressed a seemingly primary concern, that the law of public nuisance could be used to allow private citizens to potentially collect monetary damages for public nuisance (see, Callanan v. Gilman, *supra*). This concern is inapposite since monetary damages are not provided for by the statute. ECL, Article 8; State v. Sour Mountain Realty, Inc., 183 Misc.2d 313, 325 (N.Y.Sup.1999).

Nor, as stated above, are violations of SEQRA redressed by a governmental agency except in rare circumstances. The judicial branch of government retains exclusive jurisdiction to redress SEQRA violations, making judicial intervention all the more critical to ensuring that the public interest embodied in SEQRA is protected. *Compare*, Saratoga County Chamber of

Commerce, Inc. v. Pataki, 100 N.Y.2d at 814, (*stating*, "Thus, where a denial of standing would pose 'in effect ... an impenetrable barrier to any judicial scrutiny of legislative action,' our duty is to open rather than close the door to the courthouse." [citations omitted])

The special harm requirement associated with the law of public nuisance, which has been applied to challenges to land use decisions, should not be applied in these circumstances since the Court can be assured that the adverse interests raised by this challenge to government decision making will be fully adjudicated. No public policy is served by adding an additional obstacle to bona fide environmental organizations seeking standing to challenge government decisions that adversely impact the environment. On the contrary, in enacting SEQRA, the legislature found that, "Every citizen has a responsibility to contribute to the preservation and enhancement of environment." ECL § 8-0103 (2) This is especially true in the current government climate where executive actions require even greater scrutiny to ensure that the public interest is being served.

**B. The Injury Sustained to the Use and Enjoyment of Natural Resources by Save the Pine Bush and its Members Falls Within SEQRA's Zone of Interest; a Zone of Interest Far Broader Than the Zone of Interest for Land Use Law**

The zone of interest protected by SEQRA relies on the definition of "environment" which includes, "land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL 8-0105 (6); 6 NYCRR 617.2 (k). SEQRA established that the policy of the State of New York "to encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state." E.C.L. § 8-0101.

To accomplish its goal, SEQRA requires that government agencies incorporate environmental considerations into their decision making ensuring that they are taken into account as early as practicable in the formulation of an action or as soon as an application for a discretionary government agency approval is submitted. E.C.L. §8-0103(6) SEQRA prescribes the requirements a governmental body must undertake in its decision making in order to ensure that the public's interest in protecting the environment is maintained. See, Jackson v. New York State Urban Development Corp., *supra*.

By contrast, the state statutes which delegate to local government the authority to regulate land use are more limited in scope and mandate, concerned more with the relationship between neighboring land uses within a local community. See, General City Law § 20 (24); Town Law § 261; Village Law § 7-700. These specific grants of authority to regulate land use within the respective municipality provides focused authority regarding traditional zoning and land use inquiries.

Land use decisions, such as zoning, site plan, subdivision and special use approvals, integrate SEQRA in order to address the potential environmental impacts of the proposed land use decision. However, local government land use decisions, such as site plan, subdivision and special use, must adhere to and meet wholly separate and distinct statutory criteria related to whether the proposed development can be approved based on criteria set forth in local zoning laws. See *eg.*, GCL, Article 3; Town Law §§ 266-279 (subdivision), Town Law § 274-a (site plan), Town Law § 274-b (special use); Village Law §§ 7-728-738 (subdivision), Village Law § 7-725-a (site plan), Village Law § 7-725-b (subdivision).

By contrast, SEQRA requires government agencies to evaluate the impact of its actions on "ecological systems, natural, human and community resources important to the people of the state." E.C.L. §8-0101. In contrast to the more narrow questions posed

by compliance with the applicable zoning law, the gravamen of a proceeding challenging SEQRA compliance must necessarily focus on the potential substantial adverse environmental impacts of the action and whether the government adhered to the prescribed environmental review process. See, Matter of H.O.M.E.S. v New York State Urban Development Corp., 69 A.D.2d 222 (4th Dept.1979) Standing in land use cases involving SEQRA should not be unduly circumscribed given the distinct injuries that form the basis for challenge.

The statement by this Court in Society of Plastics, *Id* at 774, regarding actions to enforce SEQRA related to a land use decision, should be reconciled with the Court's articulation of principles of organizational standing as set forth in Dairylea, *supra*, Dental Society, *supra*, such that no special harm need be shown.

Indeed, the Court cited its decision in Mobil Oil Corp. v. Syracuse Indus. Development Agency, 76 N.Y.2d 428 (1990), to support its statement that standing in a combined zoning and SEQRA challenge must in some circumstances be predicated on special harm. However, the Court's decision in Mobil Oil Corp., *supra*, concluded that Mobil Oil did not have standing under SEQRA since Mobil could not demonstrate an injury in fact to the environment that it would suffer as a result of SIDA's actions. The Court distinguished, as it did in Society of Plastics,



between entities challenging SEQRA compliance whose only injury is economic and those whose primary interest is environmental.

"Under the facts present in this case, we believe that Mobil, although a nearby property owner, is not presumptively aggrieved by the Carousel Center project and that it must demonstrate that it has suffered special injury before it can be accorded standing to challenge SIDA's review of the project. To qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature" (citations omitted) Mobil Oil Corp. v. Syracuse Indus. Development Agency, 76 N.Y.2d at 433

Reliance on Mobil Oil Corp. as the basis for imposing a special harm requirement on petitioners who challenge compliance with SEQRA in land use decisions appears unfounded. Rather, Society of Plastics and Mobil Oil Corp. turn on the failure of the petitioners in those cases to allege environmental injury and therefore were found to be improper parties to adjudicate environmental issues. *Accord*, Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead, *supra*.

Petitioners seeking to challenge government agency compliance with SEQRA should not be constrained because the challenged government action rests in zoning or land use. Based on SEQRA's broad zone of interest in contrast to the narrower zone of interest encompassed by traditional zoning decisions, *Save the Pine Bush*, should not have to demonstrate the action will result in special harm to its members.

**C. Save the Pine Bush, Acting as a Private Attorney General in this Proceeding to Enforce SEQRA, Should Be Granted Access to Court Without A Demonstration of Special Harm to its Individual Members Different Than That Suffered by the General Public.**

In enacting SEQRA, the legislature intended that "to the fullest extent possible" governmental decisions should be decided in such a manner as to "prevent or eliminate damage to the environment and enhance human and community resources". E.C.L. §§8-0101 and 8-0103(6). Enforcement was left to the public[6]. As a result, citizens acting through environmental organizations that challenge government compliance with SEQRA should be afforded status as private attorneys general given the potential importance of environmental issues.

In Citizens Committee For the Hudson Valley v Volpe, 425 F 2d 97 (USCA 2d Cir. 1970), the United States Court of Appeals for the Second Circuit concluded that the organization had standing, pursuant to the Administrative Procedure Act, to challenge a permit that authorized dredging and filling of a portion of the Hudson River in connection with the proposed construction of the Hudson River Expressway.

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[6] Despite this Court's decision in *Plastics* to the contrary, failure to pass legislation granting standing to the public to enforcement environmental statutes should not be construed as legislative intent to limit standing in SEQRA cases. At least one commentator has suggested that this Court misread the legislative history and was incorrect when it determined that an earlier version of SEQRA once contained a citizen suit provision that never survived the final bill's passage by the New York State Legislature. Joan Leary Matthews, *Unlocking the Courthouse Doors, supra*, at 441-442.

"We hold, therefore, that the public interest in environmental resources - an interest created by statutes affecting the issuance of this permit - is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." *supra* at 105

The action was commenced to ensure that the federal action would be consistent with the mandate under the Hudson River Basin Compact Act to protect the Hudson River that contains resources of "[i]mmense economic, natural, scenic, historic and recreational value to all the citizens of the United States." *supra* at 105. See also, Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, (Cir Ct of App. 2d Cir, 1965) Save the Pine Bush, in this matter, seeks enforce the broad mandate of SEQRA comparable to the broad mandate referenced in Citizens Committee For the Hudson Valley, *supra*.

Imposition of the special harm rule would potentially leave state and local agency compliance with SEQRA unchallenged. In this matter, for example, due to commercial development, no residences exist in close proximity to the project site, (A. 13, 59, 183), accordingly no member of the public can obtain the presumption of, or exemption from, a demonstration of special injury as a happenstance of living in close proximity to the

hotel site.[7] The hotel site at issue herein, is also privately owned, therefore, no member of the public can use and enjoy natural resources on the project site.

It is primarily the public, through the courts, that can redress the government's failure to comply with SEQRA. Accordingly, the Court should recognize the value of environmental organizations and citizens acting as private attorneys general to enforce the broad mandate laid upon governmental agencies for SEQRA compliance. As this Court stated, "[s]tanding principles, which are in the end matters of policy, should not be heavy-handed." Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead, 69 N.Y.2d at 413.

**D. Save the Pine Bush Should Be Afforded Standing Based On Its Substantial Investment of Resources In the Albany Pine Bush Preserve.**

Save the Pine Bush's substantial contribution in financial and human resources toward protection and preservation of the Albany Pine Bush Preserve provides sufficient nexus between Save the Pine Bush and the injury in fact within the zone of interest sought to be protected by SEQRA for purposes of organizational

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[7] Another consequence of the proximity exemption or presumption is an adjacent land owner may either have no interest in upholding the public's interest set forth in SEQRA to ensure consideration of environmental impacts in governmental decision-making, or may actually have an interest adverse to the environmental considerations sought to be protected by SEQRA, though would gain unfettered standing to challenge a governmental action in an effort to undermine and delay the process.

standing.<sup>2</sup> An organization may obtain standing to file a lawsuit on behalf of its members or on its own behalf. See, MFY Legal Services, Inc. v. Dudley, 67 N.Y.2d 706 (1986) *reargument denied*, 108 A.D.2d 646 (1<sup>st</sup> Dept. 1985) *affirmed*, 67 N.Y.2D 706 (1986); Guild of Administrative Officers of Suffolk County Community College v. The County of Suffolk, 126 A.D.2d 725 (2d Dept. 1987), *appeal denied*, 69 N.Y.2d 609 (1987). The interests sought to be vindicated in this matter by Save the Pine Bush are akin to the rights sought to be vindicated in cases involving organizations which were found to have standing on their own behalf.

Although this rule has not been embraced in New York to confer standing on environmental organizations challenging SEQRA compliance by governmental agencies, ample justification is present in this matter to find Save the Pine Bush has organizational standing based on its substantial nexus to the resource sought to be protected.

An organization may sue on its own behalf for injuries it has sustained such as a direct and actual injury to real property or an interest in real property, the fiscal health of the organization, and financial impacts to or the Constitutional rights of its members. See, Irish Mixon v. Grinker, 157 A.D.2d

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<sup>2</sup> Proposed amici also submit that the Court can find that the standard for organizational standing that requires an injury in fact to the use and enjoyment of SPB's members sufficient to confer standing can be satisfied by SPB's substantial nexus to the natural resource sought to be protected.

423, 556 N.Y.S.2d 855, 857 (1st Dep't 1990)." [emphasis in original]); Grant v. Cuomo, 130 A.D.2d 154, 518 N.Y.S.2d 105 (1<sup>st</sup> Dept. 1987). An organization suing on its own behalf for injuries it has sustained must allege an injury in fact within the zone of interest of the challenged statute. Guild of Administrative Officers of Suffolk County Community College v. The County of Suffolk, 126 A.D.2d at 727.

The Court should extend the organizational standing rule to grant standing to Save the Pine Bush based on its substantial investment in the preservation and protection of the Albany Pine Bush Preserve. Injury in fact can be demonstrated by a showing that the alleged illegal governmental action drained or will drain Save the Pine Bush's resources and raise substantial obstacles to its goals to protect the Albany Pine Bush Preserve.

Where an organization can demonstrate such a direct and unmistakable impact, a demonstration of "special injury" or "special harm" different in kind than what may be suffered by the general public should not be required. Cf. Grant v. Cuomo, 130 A.D.2d at 159; Mixon v. Grinker, 157 A.D.2d at 426, 427. Relying on the United States Supreme Court case of Havens Realty Corp., *supra*, the court in Mixon found that a "drain on the organization's resources" constituted "far more than simply a setback to the organization's abstract social interests", and

could provide sufficient grounds for an organization to gain standing on its own behalf. Mixon, 157 A.D.2d at 426.

In the instant matter, Save the Pine Bush committed, over the years, a substantial investment of human, financial and other resources to establish and protect the Albany Pine Bush Preserve, the organization's "environmental asset". Save the Pine Bush v. Albany City Council, 56 A.D.3d at 40-41); (A. 18) These efforts are paid for by organization members. (A. 72.)

At a minimum, Save the Pine Bush will sustain an injury in fact if the proposed development goes forward, as development of the Hotel site could adversely impact the environmental resource that the organization was founded to protect. The environmental resources involved in the instant matter are inarguably within SEQRA's zone of interest. *See generally*, E.C.L. §8-0103.

Development of the Hotel will frustrate its long standing efforts to protect the Pine Bush Preserve. Such injury represents more than "simply a setback to the organization's abstract social interests." Havens Realty Corp. v. Coleman, 455 U.S. at 379, (cited favorably by Mixon v. Grinker, *supra.*). In the instant matter, the Appellate Division, Third Department appropriately took judicial notice of Save the Pine Bush's long standing and focused interest and investment in the creation and protection of the Pine Bush Preserve. Save the Pine Bush v. Albany City Council, 56 A.D.3d at 40-41. (A. 18)

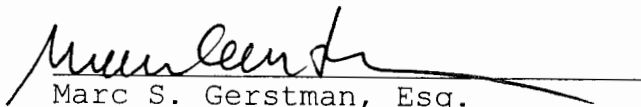
Under the facts of the instant matter, Save the Pine Bush's long standing contributions to the Albany Pine Bush Preserve through its long standing vigilance regarding protection of the Pine Bush Preserve, preparation of comments and participation in plans for the Preserve, funding litigation to protect the Preserve and other activities undertaken by SPB and its members on behalf of SPB should afford the organization standing.

### CONCLUSION

For the foregoing reasons, the Appellate Court, Third Department's ruling on standing in this matter should be upheld.

Dated: Albany, New York  
July 22, 2009

Respectfully submitted,  
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